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SUPREME COURT, U.S.

NO. 82-1539

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

WARDEN, MARYLAND PENITENTIARY,

Petitioner

v.

ROLAND ANDERSON,

Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals erred in concluding that the constitutional error in respondent's trial was not harmless beyond a reasonable doubt when, although there was strong evidence probative of guilt, the error so permeated the jury's impressions that it could not be said to have had no effect on the result of the trial.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. 82-1593

WARDEN, MARYLAND PENITENTIARY, PETITIONER

v.

ROLAND ANDERSON, RESPONDENT

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT

OPINION BELOW

The opinion of the court of appeals (Pet. Apx. 21-40) is reported at 696 F.2d 296.

JURISDICTION

The judgment of the court of appeals was entered December 15, 1982. The petition for a writ of certiorari was filed on February 15, 1983 and resubmitted on March 14, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On May 15, 1970, fifteen-year-old Roland Anderson was arrested in Anne Arundel County, Maryland. At jury trial in the Circuit Court for Calvert County, Maryland, Anderson was found guilty of rape, murder and burglary and was immediately sentenced to life imprisonment. Anderson filed for state post conviction relief in 1971. The numerous issues raised therein were heard three years later. Relief was denied on all substantive issues. Because Petitioner's attorney had failed to note a timely appeal of the conviction, leave to file belated appeal was granted.

The Court of Special Appeals of Maryland affirmed the trial court (Anderson v. State, No. 499, September Term, 1974) and the Court of Appeals of Maryland denied certiorari (Anderson v. State, Misc. Docket No. 65, September Term, 1975). Anderson filed a second post conviction proceeding in March of 1977 (Post Conviction Procedure Act Petition 2nd Proceeding, In re Anderson, Law No. L-77028, Circuit Court for Calvert County, Maryland). The court vacated Petitioner's rape and burglary convictions, but Anderson was unsuccessful in his remaining contentions. (Memorandum and Order of Court, January 31, 1978, In re Anderson, Law No. L-77028, Circuit Court for Calvert County, Maryland). Anderson's attempt to appeal on the remaining issues was disallowed due to an administrative error in the courts. In all of Anderson's attacks on his conviction, both direct and collateral, the constitutional issues which the petitioner now requests this Court to consider, were raised and rejected.

Petitioner filed for federal habeas corpus relief on June 14, 1979. Adopting the report and recommendation of the magistrate, Chief Judge Northrop granted Anderson's petition for writ of habeas corpus. Appeal was noted by the State and Petitioner cross-appealed. Following an en banc rehearing, the United States Court of Appeals for the Fourth Circuit affirmed the district court.

Roland Anderson's defense at trial was that at the time the crime was committed he was in the company of several other persons, at the home of Phyllis Marie Ireland Cook, some distance from the situs of the crime. He elected to testify, and relayed this alibi defense to the jury. He then presented two witnesses, Ms. Phyllis Cook and Mr. Clinton Roberts, whose testimony placed Mr. Anderson at the home of Ms. Cook at the time established as the hours within which the crimes were committed. These witnesses were the final witnesses in the trial.

After both the State and the defense rested, the State's Attorney advised the judge he felt Mr. Roberts had lied in his testimony. The judge ordered both witnesses held. It is not

clear from the record whether the witnesses were taken into custody while in the presence of the jury. Ms. Cook and Mr. Roberts were placed in custody in separate locations within the courthouse, and were eventually escorted to the judge's chambers where the judge and both counsel were waiting. What happened in chambers was not placed on the record, but Anderson's trial counsel later testified in a post-conviction proceeding that the judge gave the two alibi witnesses "quite a lecture." Ms. Cook later testified that the judge called her a liar during the episode and that she was frightened. Mr. Roberts's later account of the episode was in concurrence with Ms. Cook and defense counsel.

Court then reconvened and the judge addressed the jury:

> Mr. Foreman, ladies and gentlemen of the jury at the conclusion of this case two of the witnesses who testified have indicated to the Court that they told an untruth in their testimony and desire an opportunity to correct that before you ladies and gentlemen before this case concludes. As a matter of law, the Court must afford a witness an opportunity to purge himself or herself of perjury. For that purpose we are recalling these two witnesses to the stand to give them an opportunity to revise their stories to what they are now saying is the correct testimony.

Ms. Cook was again sworn. The judge, in the presence of the jury, said:

> You have indicated to the Court that a portion of the testimony that you previously gave under oath in this case was false. The Court now affords you an opportunity to correct that testimony by telling the truth and to purge yourself of the perjury you have committed. This is the last chance you will be given in this trial to tell the truth.

Following this admonition by the Court, Ms. Cook's testimony was different from that given earlier.

Mr. Roberts was then called and sworn again. The following is taken from the transcript:

> Judge Bowen: At the conclusion of the testimony in this case you indicated to the Court that some portions of the testimony you had given before this jury were false. You asked the Court for an opportunity to

purge yourself of this crime by being afforded an opportunity to tell the truth to the jury. This is your opportunity to tell the truth to the jury. It is the last one you are going to get in this trial.

A. Yes sir.

Judge Bowen: You better make good use of it.

As the court of appeals observed, "[t]he subsequent testimony of Roberts varied from the original testimony and considerably weakened the alibi." (Pet. Apx. 26) In recounting the event during the evidentiary hearing in district court some ten years later, Mr. Roberts and Ms. Cook testified that they had been in fear, and that they were confused and not sure what the judge wanted them to say. They did not characterize their initial testimony as perjury, lying, or falsehood. (See Pet. Apx. 34).

During the episode in chambers those present were the judge, the defense attorney, the State's Attorney, Ms. Cook and Mr. Roberts. Although this court is without the benefit of a record of this proceeding in chambers, the facts indicate Anderson's attorney played a passive role. The judge has stated that defense counsel objected to the witnesses' testifying a second time, but there is no indication, either in the recollection of the defense attorney or in the trial record, of any attempt of the defense attorney to request a mistrial, to examine the witnesses as hostile, to request Petitioner's presence in chambers, to request the chambers proceeding be recorded, to object to the trial judge's prejudicial remarks when court was resumed, or to request an instruction as to the circumstances under which the two witnesses changed their testimony.

At the conclusion of Ms. Cook's and Mr. Robert's testimony the second time, the judge directed them to be seated in the court room. Counsel then approached the bench and, after short remarks, the defense counsel asked the judge, "May I ask if the Court is satisfied with the revised testimony?" Judge Bowen replied, "Well I just, as far as the jury is concerned, asked them to have a seat in the court room. I did that deliberately."

ARGUMENT

The petitioner seeks review by this Court pursuant to Rule 17.1(c), (Pet. 18) arguing that the circuit court judgment in the case sub judice conflicts with the previous applicable decisions of this Court on the issue of the proper standard for determining harmless error. In its argument, petitioner has failed to demonstrate that such conflict was created by the circuit court's decision, and therefore has not supported its contention that a "special and important" reason (Rule 17.1) exists for this Court to exercise its discretion in favor of the petitioner. Further, petitioner has used the petition as a vehicle for arguing the issue of sufficiency of evidence of harmless error, an issue which provides this Honorable Court no "special and important" reason for granting review.

In Chapman v. California, 386 U.S. 18 (1967) this Court rejected the "overwhelming evidence" test by which courts had previously held constitutional errors harmless if, in spite of the error, there were overwhelming evidence of guilt. Chapman required courts to look instead to the magnitude of the error, and the contribution it could reasonably have made to the jury's verdict. The test under Chapman is "[w]hether there is a reasonable possibility that the . . . [error] complained of might have contributed to the conviction." Id. at 23-24 (citing Fahy v. Connecticut, 375 U.S. 85 (1963)). In 1969 this Court applied the Chapman rule in Harrington v. California, 395 U.S. 250 (1969) and, in further explaining Chapman stated that in determining what impact the error had on the jury (whether it contributed to the conviction) the reviewing court could consider, but not emphasize, "overwhelming evidence" of guilt. Id. at 254. The Court went on to say: "We do not depart from Chapman; nor do we dilute it by inference. We affirm it." Id. Therefore, it cannot be properly argued that Harrington in any way changed the Chapman standard.

The subsequent cases to which petitioner refers in

support of the existence of a new rule since Chapman do no more than Harrington; they apply and reaffirm Chapman, they do not alter it. See, Holloway v. Arkansas, 435 U.S. 475, 488 (1978) ("[a]ssessing the strength of the prosecution's evidence against the defendant is, of course, one step in applying the harmless-error standard. See Schneble v. Florida, 415 U.S. 427 (1972); Harrington v. California, 395 U.S. 250 (1969)"); Brown v. United States, 411 U.S. 223, 231 (1973) (erroneous evidence was harmless when "merely cumulative of other overwhelming . . . evidence," citing Harrington.); Milton v. Wainwright, 407 U.S. 371, 377 (1972) ("Our review of the record leaves us with no reasonable doubt that the jury at petitioner's 1958 trial would have reached the same verdict without hearing Langford's testimony.") Schneble v. Florida, 405 U.S. 427 (1972) (". . . unless there is a reasonable possibility that the improperly admitted evidence contributed to the conviction, reversal is not required. See Chapman v. California, 386 U.S. 18, 24 (1967).").

The Chapman test applied in each of the above cases, but considerations of overwhelming evidence were emphasized by the Court most likely because those cases concerned errors in the admission of evidence in the prosecution's case. In such cases, it is relatively easy to assess prejudice by asking whether the state had a sufficient case without the erroneously admitted evidence.

It is obvious that Chapman has not evolved into a new test, but that it remains the proper standard for analysis of harmless error.[1] Upon reading the circuit court opinion in the case sub judice, it is further obvious that the Chapman standard was applied, so that no conflict exists between the circuit court's

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[1] Of interest is the petitioner's opposition to Anderson's request for rehearing en banc, wherein he argued that the Chapman standard was "the standard to be applied in analyzing whether an error was harmless. . ."

decision and the applicable decisions of this Court. It is clear from the circuit court's discussion of the standard in the reported opinion:

> Maryland acknowledges in its brief that the trial judge's remarks were erroneous, and in argument conceded that the error was of constitutional dimension. The only issue therefore is whether the error was harmless. An error involving the denial of a federal constitutional right in a state criminal case can be held harmless only if the reviewing court is satisfied beyond a reasonable doubt that the error did not contribute to the conviction. Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L.Ed.2d 705(1967).
>
> Harm is presumed to have come from the constitutional error, and the state has the "heavy burden" of proving harmlessness beyond a reasonable doubt. Eberhardt v. Brodenkircher, 605 F.2d 275, 280 (6th Cir. 1979). See Coles v. Peyton, 389 F.2d 224 (4th Cir. 1968). The Chapman test is a "strict" one, United States v. Jones, 542 F.2d 186, 213 (4th Cir. 1976). Harmless error analysis essentially involves the question of whether the error is but a "small error[] or defect that [has] little, if any, likelihood of having affected the result of the trial." Eberhart v. Bordenkircher, 605 F.2d 275, 279 (6th Cir. 1979), quoting Chapman, 386 U.S. at 22, 87 S.Ct. at 827. Both Chapman and a succeeding harmless error case, Harrington v. California, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969), warn against "giving too much emphasis to 'overwhelming evidence' of guilt," where constitutional error affects substantial rights. Allison v. Gray, 603 F.2d 683, 635 (7th Cir. 1979).
>
> In gauging, then, the harmlessness vel non of the trial judge's conduct and comments in this case, we look to its reasonably possible effect on the outcome. We must look at the evidence, and the reasonably possible effects of the error on the jury's consideration of that evidence.

(Pet. Apx. 29-31).

It is also clear that the circuit court applied the proper standard when one reads the analysis. It cannot be said in truth that the court did not give full consideration to the amount of evidence against Anderson at trial. (Pet. Apx. 31-33). The court concluded, "[i]t cannot be argued that there was not strong evidence probative of Anderson's guilt - there was." (Pet. Apx. 34).

Petitioner makes liberal use of the argument in his

petition by setting out what, in reality, is an argument that there was sufficient evidence before the circuit court to support a finding of harmlessness.[2] The inconsistency pointed to in this portion of petitioner's argument is the one between the panel opinion and the en banc decision. Although respondent would argue that such an issue is not grounds for granting, he feels compelled to address two of petitioner's assertions.

First, the petitioner states that the circuit court gave no regard to Sumner v. Mata, 449 U.S. 539 (1981) and the presumption of correctness set forth in 28 U.S.C. § 2254(d). In fact, there is no indication that the court ignored the presumption of correctness to which petitioner refers with regard to Anderson's confession. The determination made by the trial judge with regard to the confession was merely that it cleared the initial voluntariness threshhold for admissibility as required by Maryland law, Bellamy v. State, 50 Md. App. 65, 71-72 (1981) cert. denied, 292 Md. 376 (1982), not that the confession was voluntary beyond a reasonable doubt. There is no showing in the circuit court's opinion that it did not consider the confession admissible. The appellate court addressed only the weight of the confession. (Pet. Apx. 31-32).

Second, the petitioner argues that the circuit court "concluded that if Anderson's alibi defense had been believed by the jury, it would have been highly unlikely that Anderson committed the crime." (Pet. Apx. 14). The opinion reflects no such conclusion and petitioner's analysis is in error. To the contrary, in the passage to which petitioner refers, the court stated that the state presented sufficient evidence to support

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[2]Petitioner states: "[e]ither the majority misunderstands the law or is ignoring it because the only logical conclusion is that the trial courts perhaps intemperate remarks were obviously harmless when properly analyzed." (Pet. 13) and ". . . the Court of Appeals' opinion fundamentally misinterprets the facts of this case." (Pet. 14). (See also Pet. 18).

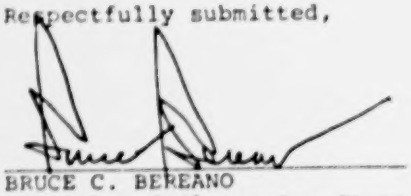
a guilty verdict. The court went on to state that the trial judge's errors were so permeating that the trial was constitutionally unfair. (Pet. Apx. 35-36).

Finally, the inclusion of petitioner's arguments on the weight of the evidence cloud and confuse the basis alleged for certiorari. The majority of petitioner's argument relates to matters unrelated to whether the standard applied by the circuit court was congruous with the applicable decision of this Court. For these reasons, Anderson asserts that Rule 21.5 applies, and for the reason that petitioner failed to present his argument with "accuracy, brevity, and clearness," the petition should be denied.

CONCLUSION

For the reasons contained in this brief, the petition for writ of certiorari should be denied.

Respectfully submitted,



BRUCE C. BEREANO
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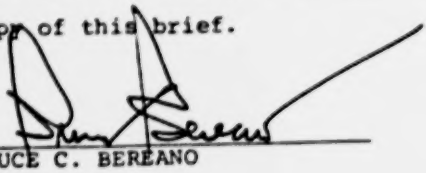
Annapolis, Maryland 21401
(301) 267-0410
Counsel for Respondent

PROOF OF SERVICE

I hereby certify that on this 11th day of April, 1983, I mailed a copy of this typewritten brief to Stephen H. Sachs, Attorney General of Maryland, Deborah K. Handel, Assistant Attorney General and Chief Criminal Appeals, and Philip M. Andrews, Assistant Attorney General at Fourth Floor, Munsey Building, Seven North Calvert Street, Baltimore, Maryland 21202, by depositing a copy of said brief, postage prepaid, in a United States Post Office or mailbox.

The above-mentioned persons are the only persons who are required to be served with a copy of this brief.



BRUCE C. BEREANO

IN THE SUPREME COURT OF THE UNITED STATES

WARDEN, MARYLAND PENITENTIARY, *
Petitioner *
v. *
ROLAND ANDERSON, *
RESPONDENT *
* * * * * * * * * *

Case Number: 82-1593
October Term, 1982

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RESPONDENT'S MOTION TO PROCEED IN FORMA PAUPERIS

Comes now the Respondent, Roland Anderson, by and through his counsel of record, Bruce C. Bereano, and, pursuant to Rule 46 and 28 U.S.C § 1915, moves this Honorable Court to allow him to proceed in the above-captioned matter in forma pauperis. In support thereof he states as follows:

1. That Respondent has been incarcerated in the custody of the Department of Corrections of the State of Maryland since 1970 and receives a miniscule income as compensation for work he performs while incarcerated.

2. Respondent has no income or means of income other than what he receives for work performed for the Department of Corrections, State of Maryland, and is therefore unable to pay the fees and costs of his representation in this matter, or to give security therefor.

3. That although Respondent's parents engaged private counsel for Respondent's original trial, the subsequent appeal of the conviction to the Court of Special Appeals of Maryland and petition for certiorari to Maryland's highest court were performed by the State of Maryland Office of the Public Defender. Similarly, in both of Respondent's collateral attacks in the state courts he qualified for the services of public counsel.

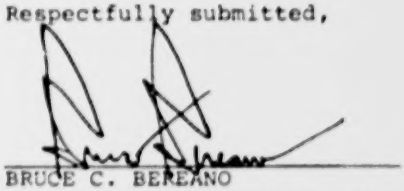
4. That from the time Respondent filed for habeas corpus relief in the United States District Court for the District of Maryland in June of 1979, Bruce C. Bereano has represented

Respondent by appointment under the Criminal Justice Act. Such representation has included an evidentiary hearing and motions and pleadings on the district court level for which counsel has been compensated under the Criminal Justice Act. Additionally, counsel was appointed to represent Respondent before the Fourth Circuit Court of Appeals, and has done so in the initial briefs and argument of the matter and the rehearing en banc before that court. Present counsel remains under appointment in Anderson's brief in opposition to petition for writ of certiorari.[1]

5. Fairness dictates that Respondent be afforded the services of an attorney to counter and respond to the petition for writ of certiorari filed in this matter. Respondent believes that he is entitled to redress.

6. Respondent has filed on even date herewith his brief in opposition to petition for certiorari which he believes to comply with the Rules of this Court.

Respectfully submitted,



BRUCE C. BEREANO
195 Duke of Gloucester Street
Annapolis, Maryland 21401
(301) 267-0410
Counsel for Respondent

PROOF OF SERVICE

I hereby certify that on this 14 day of April, 1983, I mailed a copy of Respondent's Motion to Proceed In Forma Pauperis to Stephen H. Sachs, Attorney General of Maryland, Deborah K. Handel, Assistant Attorney General and Chief Criminal Appeals, and Philip M. Andrews, Assistant Attorney General, at Fourth Floor, Munsey Building, Seven North Calvert Street, Baltimore, Maryland, 21202, by depositing a copy of said motion, postage prepaid, in a United States Post Office or mailbox.

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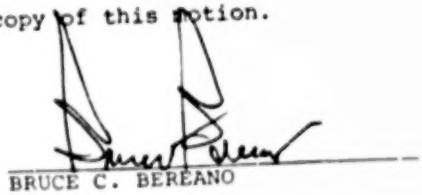
[1] Respondent attaches no affidavit hereto for the reason that he is presently represented by counsel under the Criminal Justice Act. Rule 46.1.

The above-mentioned persons are the only persons who are required to be served with a copy of this motion.



BRUCE C. BEREANO

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NOTICE OF MAILING

I, Bruce C. Bereano, do hereby affirm on my personal knowledge as follows:

1. That I am a member of the Bar of the Supreme Court of the United States.

2. That I am the attorney for Roland Anderson, Respondent, in the above-captioned case.

3. That on April 14, 1983,.one copy of the Brief for Respondent was sent to the Supreme Court and one copy was sent to Stephen H. Sachs, Attorney General of Maryland, Deborah K. Handel, Assistant Attorney General and Chief Criminal Appeals and Philip M. Andrews, Assistant Attorney General, Fourth Floor, Munsey Building, Seven North Calvert Street, Baltimore, Maryland, 21202, by depositing same, postage prepaid, in the United States mail.

BRUCE C. BEREANO
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